Pendakwa Raya v Mansor bin Mohd Rashid & Anor

FEDERAL COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO 05-57-1993
CHONG SIEW FAI CJ (SABAH & SARAWAK), PEH SWEE CHIN AND MOHAMED DZAIDDIN FCJJ
7 SEPTEMBER 1996

Criminal Procedure *— Trial — Close of prosecution's case — Charge of trafficking in dangerous drugs — Whether prosecution had established a case under s 180 of Criminal Procedure Code (FMS Cap 6) — Criminal Procedure Code (FMS Cap 6) s 180*

Criminal Law *— Dangerous Drugs Act 1952 (Malaysia) — Section 39B(1)(a) — Trafficking in dangerous drugs — Prosecution's case founded on sale of cannabis to police agent provocateur — Prosecution did not invoke presumption of possession based on custody or control of drugs —Whether exclusivity of possession of room from which drugs were found an important issue — Dangerous Drugs Act 1952 s 39B(1)(a)*

Evidence *— Adverse inference — Failure to call witness — Failed to call informer as witness — Whether informer had assumed role of agent provocateur — Whether court entitled to draw adverse inference against prosecution — Whether depended on circumstances of each particular case — Evidence Act 1950 s 114(g)*

Evidence *— Expert evidence — Chemist's evidence — Failure to give evidence as to how she handled cannabis from the time when she received it from investigating officer for analysis until she handed it back to him — Defence did not cross-examine on or raise issue — Whether there was a break in the chain of evidence*

Evidence *— Fingerprint evidence — Trafficking in dangerous drugs — Prosecution's case founded on sale of cannabis to police agent provocateur — Identity of accused not in question — Failure of police to lift fingerprints from the cannabis' wrapper — Whether fatal*

Words and Phrases *— 'Trafficking'*

Following a tip from an informer, the police from the drug prevention unit started investigation on the operation of a drug syndicate in Perak. The informer introduced a police agent provocateur, who posed as a trafficker who wanted to buy cannabis, to the second respondent. The second respondent later took them to a house to see his 'partner', the first respondent. On 31 July 1991, the informer and the police agent provocateur returned to the house to carry out negotiations for the sale and purchase of cannabis with the respondents. When the police agent provocateur expressed his intention to inspect the merchandise, the second respondent took a slab of plant material which was wrapped with a transparent plastic from a room in the house. As planned, the informer was then asked to get the money from a car parked outside the house, and the police agent provocateur then excused himself to go to the washroom. At

this time, the team of police which were stationed outside the house moved in to arrest the respondents. The plant material were confirmed to be cannabis by the government chemist. The two respondents were charged with trafficking in dangerous drugs under s 39B(1)(a) of the Dangerous Drugs Act 1952. At trial, the judge held that no prima facie case had been made out against the respondents, on the following grounds: (i) it was doubtful whether the cannabis produced in this case was the very cannabis seized by the police — there was a patent break in the chain of evidence as the chemist failed to give evidence as to how she handled the cannabis from the time she received it from the investigating officer until the time she handed them back to him; (ii) a person called Amran was also the occupier of the room from which the cannabis was taken, and hence the respondents could not be said to have exclusive custody and control of the drugs; (iii) the prosecution had failed to call Amran as well as the informer, who had actually played the role of an agent provocateur, as witnesses, and thus the court was entitled to draw adverse presumptions under s 114(g) of the Evidence Act 1950 ('the Act'); and (iv) the failure of police to, inter alia, lift fingerprints from the cannabis' wrapper and to take photographs of the street-lights in relation to the house, had grave adverse effect on the prosecution's case. The trial judge accordingly acquitted and discharged the respondents without their defence being called. The public prosecutor appealed.

Held, allowing the appeal:

(1) On the evidence adduced, there could not be any doubt that the cannabis seized and handed to the chemist and the investigating officer was the cannabis produced in court. When no such doubt existed, it was not essential for the chemist to show how she kept the cannabis before returning it to the investigating officer, particularly when the defence did not at all cross-examine on or raise the issue (see p 573C–G); *Su Ah Ping v PP* [1980] 1 MLJ 75 followed; *Abdul Jalil bin Abdul Satar v PP* [1991] 2 MLJ 194 distinguished.

(2) The trial judge was unduly concerned with the exclusivity of possession of the room in which the drugs were found. It was essential to bear in mind that the case of the prosecution was not based on custody or control of the cannabis thereby invoking the presumption of possession, or on possession of 200g or more cannabis thereby attracting the presumption of trafficking under s 37(d) or (da)(vi) of the Act. The prosecution founded its case of trafficking on the 'sale' of the cannabis to the police agent provocateur. The definition of 'trafficking' is wide and includes buying, selling, carrying, keeping and concealing dangerous drugs (see pp 573I and 574A–B).

(3) In the instant case, there was more than credible evidence from the testimony of the police agent provocateur that the respondents acted in concert in the sale of the cannabis to him. The negotiation to buy cannabis on the first occasion was spearheaded by the second respondent who told the agent provocateur that his partner had cannabis. The agent provocateur was later introduced to the first respondent (see p 574C); *PP Mohamed Halipah* [1982] 1 MLJ 155 followed, *Lee Chee Ming v PP* [1992] 1 SCR 1 and *Choo Chang Teik & Anor v PP* [1991] 3 MLJ 423 distinguished.

(4) There was not a thread of evidence that the person known as Amran had in any way participated in any of the two negotiations or was in any way or manner concerned with the sale of cannabis in this case. The facts that he existed and was concerned in the rental of the house were of little relevance to the charge against the respondents having regard to the basis upon which the prosecution preferred its charge, ie one of sale (see pp 574I and 575A–B).

(5) The trial judge had erred in law when he faulted the investigating officer for not lifting the finger prints off the wrappings of the cannabis and for not taking photographs of the street light in front of the house. Where the identity of a culprit is in question, fingerprint evidence would be of great significance. In the present case, the charge alleged trafficking in the form of sale and there was evidence indicating the identities of the alleged offenders and the sale transaction. Fingerprint evidence, therefore, assumed little value (see p 575C–D).

(6) The trial judge had used the first respondent's statement to conclude that Amran occupied the room, and that the first respondent was not involved in selling the cannabis. This approach was wrong. A purely exculpatory or self-serving statement is not evidence of the facts stated though it may be admitted to show the reaction or attitude of the accused at the time when he made it (see pp 575I and 576A); *PP v Adetunji Adeleye Sule* [1993] 2 MLJ 70, *PP v Chan Kim Choi* [1989] 1 MLJ 404, *Chan Kin Choi v PP* [1991] 1 MLJ 260 and *R v Storey and Anwar* (1968) 52 Cr App R 334 followed.

(7) Though the informer introduced the police agent provocateur to the second respondent, there was no evidence that the informer had done anything apart from being present during the negotiations. It appeared that his presence was merely to lend credence to the agent provocateur's intention to purchase the cannabis in the minds of the respondents. Even if the informer exceeded the limits of an informer and became an agent provocateur, there was more than credible evidence of the respondents' involvement in the negotiation and agreement to sell to the police agent provocateur the cannabis (see pp 578F–

H); *Munusamy v PP* [1987] 1 MLJ 492 followed, *Namasiyiam & Ors v PP* [1987] 2 MLJ 336 distinguished.

(8) The decision to invoke an adverse inference under s 114 of the Act was not a matter of an inflexible rule but depended upon the circumstances of each particular case. The question to consider was whether the existence of a fact of a state of things made the existence of another fact or state of things so likely that it may be presumed to exist. The answer must necessarily vary according to the circumstances, the nature of the fact required to be proved and its importance in the controversy, the usual mode of proving it, the nature quality and cogency of the evidence which had not been produced and its accessibility to the party concerned (see p 579D–E).

(9) Having regard to the definition of 'trafficking' and the evidence adduced including the evidence of sale, this court was unanimously of the view that the non-calling of the informer and Amran did not affect the success of the prosecution at the conclusion of its case in establishing a case under s 180 of the Criminal Procedure Code (FMS Cap 6), that a case under the said s 180 against both respondents had been made out, and that this was so even if the more stringent test of 'proof beyond reasonable doubt' as propounded in *Arulpragasan a/l Sandaraju v PP* (Federal Court Criminal Appeal No 05–237–1992) were to be applied (see pp 579I and 580A–B).

[Bahasa Malaysia summary

Ekoran daripada maklumat oleh seorang informer, anggota polis dari unit pencegahan dadah telah memulakan penyiasatan ke atas kegiatan sebuah sindiket dadah di negeri Perak. Informer telah memperkenalkan seorang ejen provokasi polis, yang berlagak sebagai seorang pengedar yang ingin membeli ganja, kepada penentang kedua. Penentang kedua kemudiannya telah membawa mereka ke sebuah rumah untuk berjumpa dengan 'rakan kongsinya', penentang pertama. Pada 31 Julai 1991, informer dan ejen provokasi polis telah kembali ke rumah itu untuk memulakan perundingan jualan dan belian ganja dengan penentang-penentang. Apabila ejen provokasi polis menyatakan hasratnya untuk memeriksa dagangan, penentang telah mengambil bidur bahan tumbuhan yang dibalut dengan plastik lut sinar dari sebuah bilik dalam rumah itu. Seperti yang telah dirancang, informer disuruh mengambil wang dari sebuah kereta yang telah diletak di luar rumah itu, dan ejen provokasi polis meminta diri untuk pergi ke bilik air. Pada masa ini, pasukan polis yang telah ditempatkan di luar rumah masuk ke dalam untuk menangkap penentang-penentang. Bahan tumbuhan disahkan sebagai ganja oleh ahli kimia kerajaan. Kedua-dua penentang dipertuduhkan dengan kesalahan pengedaran dadah berbahaya di bawah s 39B(1)(a) Akta

Dadah Berbahaya 1952. Di perbicaraan, hakim telah memutuskan bahawa tiada kes prima facie telah dibuat terhadap penentang-penentang, atas alasan: (i) ianya diragui sama ada atau tidak ganja yang dikemukakan dalam kes ini adalah ganja yang dirampas oleh polis — terdapatnya pemutusan dalam rangkaian keterangan oleh kerana ahli kimia telah gagal memberi keterangan bagaimana beliau mengendalikan ganja dari masa ianya diterima daripada pegawai penyiasat sehingga masa dikembalikan kepada pegawai tersebut; (ii) seorang bernama Amran juga merupakan penghuni bilik dari mana ganja telah diambil, dan justeru itu, penentang-penentang tidak boleh dikatakan mempunyai jagaan dan kawalan eksklusif ke atas dadah itu; (iii) pihak pendakwa telah gagal memanggil Amran dan juga informer, yang sebenarnya telah memain peranan seorang ejen provokasi, sebagai saksi, dan oleh yang demikian mahkamah berhak membuat anggapan bertentangan di bawah s 114(g) Akta Keterangan 1950 ('Akta tersebut'); dan (iv) kegagalan polis, antara lain, untuk mengesan cap jari daripada pembalut ganja dan untuk mengambil gambar lampu jalan berhubung dengan rumah itu mempunyai akibat serius ke atas kes pihak pendakwa. Lantaran itu, hakim perbicaraan membebaskan dan melepaskan penentang-penentang tanpa pengemukaan pembelaan. Pendakwa raya membuat rayuan.

Diputuskan, membenarkan rayuan:

(1) Berdasarkan keterangan yang dikemukakan, tiada sebarang keraguan bahawa ganja yang dirampas dan diserahkan kepada ahli kimia dan pegawai penyiasat adalah ganja yang dikemukakan di mahkamah. Apabila tiada keraguan wujud, ahli kimia tidak perlu menunjukkan bagaimana beliau menyimpan ganja itu sebelum mengembalikannya kepada pegawai penyiasat, khususnya apabila pembela langsung tidak menyoal balas atau membangkitkan isu itu (lihat ms 573C–G); *Su Ah Ping v PP* [1980] 1 MLJ 75 diikut; *Abdul Jalil bin Abdul Satar v PP* [1991] 2 MLJ 194 dibeza.

(2) Hakim perbicaraan terlalu mementingkan persoalan keekslusifan milikan bilik dalam mana dadah dijumpai. Perlu diingati bahawa kes pihak pendakwa bukan berasaskan jagaan atau kawalan ganja dan dengan itu membangkitkan anggapan milikan, atau milikan 200g ganja atau lebih lalu menimbulkan anggapan pengedaran di bawah s 37(d) atau (da)(vi) Akta tersebut. Kes pengedaran pihak pendakwa adalah berdasarkan 'jualan' ganja kepada ejen provokasi polis. Takrifan 'pengedaran' adalah luas dan merangkumi membeli, menjual, membawa, menyimpan dan menyembunyi dadah berbahaya (lihat ms 573I dan 574A–B).

(3) Dalam kes ini, terdapat keterangan yang lebih daripada boleh dipercayai iaitu testimoni ejen provokasi polis bahawa penentang-penentang telah bertindak bersama-sama dalam jualan ganja

kepadanya. Perundingan jual-beli pada kali pertama dimulakan oleh penentang kedua yang memberitahu ejen provokasi bahawa rakan kongsinya memiliki ganja. Ejen provokasi kemudiannya diperkenalkan kepada penentang pertama (lihat ms 574C); *PP Mohamed Halipah* [1982] 1 MLJ 155 diikut, *Lee Chee Ming v PP* [1992] 1 SCR 1 dan *Choo Chang Teik & Anor v PP* [1991] 3 MLJ 423 dibeza.

(4) Tiada sebarang keterangan bahawa orang yang dikenali sebagai Amran telah menyertai mana-mana daripada dua perundingan tersebut atau terlibat dalam apa-apa cara dengan jualan ganja dalam kes ini. Fakta bahawa dia wujud dan terlibat dalam penyewaan rumah tidak begitu relevan kepada pertuduhan terhadap penentang-penentang memandangkan asas atas mana pihak pendakwaan telah membuat pertuduhan, iaitu pertuduhan jualan (lihat ms 574I dan 575A–B).

(5) Hakim perbicaraan terkhilaf dari segi undang-undang apabila beliau menyalahkan pegawai penyiasat kerana tidak mengesan cap jari dari pembalut ganja dan kerana tidak mengambil gambar lampu jalan di hadapan rumah. Di mana identiti seseorang penjenayah dipersoalkan, keterangan cap jari berperanan penting dan tinggi nilainya. Di dalam kes ini, pertuduhan mengatakan pengedaran dalam bentuk jualan dan terdapat keterangan yang menunjukkan identiti pesalah yang didakwa dan transaksi jualan. Oleh yang demikian, keterangan cap jari kurang nilainya (lihat ms 575C–D).

(6) Hakim perbicaraan telah menggunakan pernyataan penentang pertama dalam membuat kesimpulan bahawa Amran menduduki bilik itu, dan bahawa penentang pertama tidak terlibat dalam jualan ganja. Pendekatan ini adalah salah. Suatu pernyataan yang bersifat membebaskan atau berkepentingan sendiri semata-mata bukanlah bukti fakta yang dinyatakan walaupun ia boleh diterima bagi menunjukkan reaksi atau sikap tertuduh pada masa dia membuat pernyataan itu (lihat ms 575I dan 576A); *PP v Adetunji Adeleye Sule* [1993] 2 MLJ 70, *PP v Chan Kim Choi* [1989] 1 MLJ 404, *Chan Kin Choi v PP* [1991] 1 MLJ 260 dan *R v Storey and Anwar* (1968) 52 Cr App R 334 diikut.

(7) Walaupun informer telah memperkenalkan ejen provokasi polis kepada penentang kedua, tiada keterangan yang menunjukkan bahawa informer telah membuat apa-apa kecuali hadir sewaktu perundingan. Nampaknya kehadirannya hanyalah untuk menunjukkan kepada penentang-penentang bahawa niat ejen provokasi untuk membeli ganja adalah benar. Jika pun informer telah melampaui had seseorang informer dan dengan itu menjadi ejen provokasi, terdapat keterangan yang lebih daripada boleh dipercayai yang menunjukkan penglibatan penentang-penentang

dalam perundingan dan persetujuan untuk menjual ganja kepada ejen provokasi polis (lihat ms 578F–H); *Munusamy v PP* [1987] 1 MLJ 492 diikut, *Namasiyiam & Ors v PP* [1987] 2 MLJ 336 dibeza.

(8) Keputusan untuk menggunakan inferens bertentangan di bawah s 114 Akta tersebut bukanlah mengenai rukun yang tidak fleksibel tetapi bergantung kepada keadaan setiap kes tertentu. Persoalan yang harus dipertimbangkan ialah sama ada kewujudan sesuatu fakta atau keadaan membuatkan kewujudan suatu fakta atau keadaan lain begitu mungkin hinggakan ia boleh dianggap wujud. Jawapannya mestilah berbeza menurut keadaan, sifat fakta yang perlu dibuktikan dan kepentingannya dalam kontroversi, cara ia biasanya dibuktikan, sifat kualiti dan kebolehpercayaan keterangan yang tidak dikemukakan dan sama ada ia mudah atau tidak didapatkan oleh pihak yang terlibat (lihat ms 579D–E).

(9) Memandangkan takrifan 'pengedaran' dan keterangan yang dikemukakan termasuk keterangan atas jualan, mahkamah ini berpendapat bahawa fakta informer dan Amran tidak dipanggil tidak menjejaskan kejayaan pihak pendakwa di penutup kesnya dalam mewujudkan suatu kes di bawah s 180 Kanun Prosedur Jenayah (NMB Bab 6), bahawa suatu kes di bawah s 180 tersebut terhadap kedua-dua penentang telah pun dibuat, dan ini adalah demikian jika pun ujian 'bukti melampaui keraguan munasabah' yang lebih ketat dipakai seperti yang dikemukakan dalam *Arulpragasan a/l Sandaraju v PP* (Rayuan Jenayah Mahkamah Persekutuan No 05–237–1992) (lihat ms 579I dan 580A–B).]

Notes

For cases on Dangerous Drugs Act 1952, see 4 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 30–233.

For cases on presumptions, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1281–1359.

For cases on adverse inference, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 77–119.

For cases on expert evidence, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 896–961.

For cases on the close of prosecution case, see 5 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 2899–2915.

Cases referred to

Abdul Jalil bin Abdul Satar v PP [1991] 2 MLJ 194

Arulpragasan a/l Sandaraju v PP (Federal Court Criminal Appeal No 05–237–1992)

Chan Kin Choi v PP [1991] 1 MLJ 260

Choo Chang Teik & Anor v PP [1991] 3 MLJ 423

Lee Chee Ming v PP [1992] 1 SCR 1

Munusamy v PP [1987] 1 MLJ 492
Namasiyiam & Ors v PP [1987] 2 MLJ 336
Pang Chee Meng v PP [1992] 1 MLJ 137
PP v Adetunji Adeleye Sule [1993] 2 MLJ 70
PP v Chan Kim Choi [1989] 1 MLJ 404
PP v Manoharan a/l Ratnasamy [1989] 1 MLJ 504
PP v Mohamed Halipah [1982] 1 MLJ 155
PP v Tahir bin Kassim [1985] 1 MLJ 381
R v Storey (1968) 52 Cr App R 334
Su Ah Ping v PP [1980] 1 MLJ 75
Teh Geok Hock v PP [1989] 3 MLJ 162

Legislation referred to

Criminal Procedure Code (FMS Cap 6) s 180
Dangerous Drugs Act 1952 ss 2, 37, 37(1)(d), 37(da)(vi), 39B(1)(a), 40, 40A
Evidence Act 1950 ss 27, 114(g)

Appeal from: Criminal Trial No 58–10–92 (High Court, Taiping)

Kamaruzaman bin Abdul Jalil (Deputy Public Prosecutor) for the appellant.
V Sithambaram for the first respondent/first accused.
Gurbachan Singh for the second respondent/second accused.

Cur Adv Cult

Chong Siew Fai CJ (Sabah & Sarawak) (delivering the judgment of the court): This is an appeal by the prosecution against the order of acquittal and discharge of the two respondents at the close of the case for the prosecution.

The two respondents, together with another person, were charged in the High Court at Taiping with trafficking in dangerous drugs under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). The charge, worded in Bahasa Malaysia, may be translated into English as follows:

> That you jointly on 31 July 1991 at about 1.30am in a house numbered 129, Jalan 17, Taman Kuning Sari, Taiping in the district of Larut and Matang in the state of Perak Darul Ridzuan did, on your own behalves, traffick in a dangerous drug, to wit, 902g of ganja in contravention of s 39B(1)(a) of the Dangerous Drugs Act 1952 and thereby committed an offence punishable under s 39B(2) of the said Act read with s 34 of the Penal Code (FMS Cap 45).

After hearing the evidence of 13 prosecution witnesses and the submissions of counsel, the learned trial judge ordered the acquittal and discharge of the three accused without calling for their defence. Against the said order, the public prosecutor appeals but only in respect of the first and the second accused (the first and second respondents in this appeal).

The Prosecution's Case

The evidence adduced by the prosecution may be briefly summarized as follows.

Following a tip from an informer on 17 July 1991, PW8, ASP Badaruddin bin Hj Zafari — officer-in-charge of the drug prevention unit, Taiping — directed PW9, Detective Corporal Busra bin Abdul Kadir, to investigate the authenticity of the information that a drug syndicate was operating in the district of Lenggong and Taiping in Perak. To facilitate the investigation, PW8 set up a rendezvous between PW9 and the informer (later identified as Cholar) on 18 July 1991 at 3.15pm. Both Cholar and PW9 then left for Lawin, Lenggong at 3.30pm on the same day where, according to PW9, he (PW9) was introduced to the second respondent, Ideris, by Cholar with the words 'kita satu line'. When PW9 revealed his wish to purchase ganja, the second respondent told him that he had no supply with him at that material time and that the cannabis was with his partner in Taiping. The second respondent promised to introduce PW9 to his partner.

On 22 July 1991 at 9.30pm, PW9 was taken to a house No 129, Jalan 17, Taman Kuning Sari, Taiping where he was introduced by the second respondent to the first respondent, Mansor. PW9 further testified that on this occasion he also saw an unidentified Malay man who was not introduced to him. At this meeting, PW9 managed to purchase one kati of ganja at the price of RM1,000 from the first respondent. PW9 also agreed to return to buy another two kilogrammes of ganja at RM1,500 per kg and the first respondent suggested the delivery to be on the night of 31 July 1991 in the same house.

Being informed of the new development, PW8 swung into action. About 15 minutes past midnight on 31 July 1991, PW8 and his men were already in position. They hid behind some bushes in front of the said house. Two kept vigilance at the back entrance of the house and another two were placed at the entrance of the road leading from Jalan Besar Taiping Changkat Jering to Taman Kuning Sari.

According to PW8, when they took their ambush position, the house was lighted but empty and the front portion of the house was also illuminated by a street lamp. PW8 said from his position he could see the house clearly and that at around 12.45am, he saw a Toyota Corolla car with registration plate No BBD 7216 pull up in the house compound. Two men alighted and entered the house. Five minutes later PW9, the second respondent and Cholar arrived in a car which was parked in front of the house but outside the compound.

PW9 said when they arrived at the house, the first respondent and the third accused Khasim were already inside. After 35-40 minutes of drinks and casual conversation, PW9 asked the first respondent about the two kilogrammes of ganja promised to him earlier. The first respondent replied that he only had one kilogramme and quoted RM1,500 for its price

which PW9 accepted. When PW9 expressed his intention to inspect the merchandise, the first respondent allegedly told the second respondent in Kedah dialect: 'Deris, pi siapkan barang'; whereupon the second respondent got up, went to a room marked 'K' in the sketch plan P23 and came out about 15-20 minutes later with a packet wrapped in newspaper. PW9 opened the packet in the presence of Khasim and Cholar and saw a slab of compressed plant material which was further wrapped in white (transparent) plastic with yellow loytape. After that, Khasim left for the bathroom. As planned, PW9 asked Cholar to get the money from his car outside; and when Cholar was a safe distance away, PW9 excused himself to go to the toilet and pressed his car alarm as a signal for his colleagues to move in, which they did. PW8 and his men rushed in through the front door, identified themselves as the police and told the two respondents not to move, which the two respondents ignored and began to flee. The first respondent, however, made no headway as he was soon overpowered. The second respondent managed to get to the door but his success was short-lived as he was soon arrested.

During the operation, PW8 also seized, inter alia, the compressed plant material wrapped in newspaper, two sets of house keys, the car keys in respect of the Toyota car and a brown clutch bag, containing RM3,691. This last item was seized in the room from which the ganja was taken out.

Back at the police station, the respondents and the exhibits seized were handed over to the investigating officer of this case, Insp Suhaimi bin Hashim (PW13) at about 3.30am on the same day who kept all the exhibits (except the car) in a steel cabinet in his room. At 2pm on the same day, PW13 took out the packet of ganja and had photographs taken of it (P11A and P11B) after which he sealed the packet with a PDRM'92 seal and put it back in the steel cabinet. The following day (1 August 1991) at about 2pm, he sent the packet of ganja to the government chemist, Lam Yoke Ching (PW1).

Before the packet was handed over to PW1, Noraini bin Aziz (PW12) a clerk in the Chemistry Department, Ipoh registered the packet as (IP) 7458191 and this number was written on the packet. After registration, the packet was handed back to PW13 who then brought it to see PW1. PW1 acknowledged receipt of the packet by issuing PW13 with receipt (P9). After the analysis by PW1, it was confirmed that the compressed plant material in the packet was cannabis having a net weight of 902g.

Findings of the Learned Trial Judge

In holding that no prima facie case had been made out against the two respondents, the learned trial judge gave the following reasons:

(i) The chain of evidence in respect of the cannabis:

The learned trial judge held that there was no evidence as to how PW1 handled the cannabis from the time she received it from PW13 till the time it was handed back to the latter — a period of two

months 17 days from 1 August 1991 to 18 October 1991, that there were, at the material time, nine chemists — in the Chemistry Department and that the possibilities of other chemists working in the same laboratory and of a mix-up of cannabis in this case with those of other cases could not be ruled out since there was no evidence where the cannabis in this case was kept and whether under lock. The learned trial judge therefore expressed doubt whether the cannabis produced in this case was the very cannabis seized by PW8 from the living room in house No 129, and he found that there was 'a patent break in the chain of evidence'.

(ii) Exclusive possession of room 'K', and custody and control of the cannabis therein:

The learned trial judge held that Amran was given keys to the house No 129 by PW7 Azian and that Amran occupied the room 'K' of the house as reflected in the cautioned statement of the first respondent (D25). He concluded that Amran had access or occupation of the premises, and that the two respondents and the third accused (since acquitted) could not be said to have exclusive custody and control of the drugs found in room 'K'.

The learned trial judge then accepted that the second respondent was in 'manual possession' of the cannabis and was therefore deemed to be in possession of the drug unless the contrary was proved (s 37(d) of the Act). While conceding that an accused's conduct, demeanour and cautioned statement, if any, might be taken into account in considering the weight to be accorded to the defence citing *PP v Adetunji Adeleye Sule* [1993] 2 MLJ 70 in support, he ruled that (to use his own words):

> ... the serious break in the chain of evidence in regard to the cannabis while they were in the hands of the government chemist, would entitle the three accused persons to an acquittal without their defence being called at all.

(iii) The role played by the informer, Cholar:

The learned trial judge was of the view that the role played by Cholar was more than that of an informer and disentitled him to the statutory protection under s 40(1) of the Act. Based on the evidence that Cholar introduced PW9 to the second respondent on 18 July 1991, accompanied and witnessed PW9 purchasing one kati of ganja from the first accused on 22 July 1991 in the house No 129; and again accompanied and was present throughout the discussion between the first respondent and PW9 regarding the purchase of the cannabis (subject matter of this offence) on 31 July 1991 in the said house, the learned trial judge said 'the informer participated in the trap set up by Badaruddin which eventually led to the arrest of the three accused persons and the seizure of the drugs.' Thus the learned trial judge said that Cholar was not just an informer but an active agent provocateur, and that failure by the prosecution to call or offer

Cholar to the defence would give rise to adverse inference under s 114(g) of the Evidence Act 1950.

(iv) Amran — s 114(g) of the Evidence Act 1950

The learned trial judge found in evidence that PW7, Azian was a neighbour entrusted by the owner of the house No 129 (PW5) to look for tenants and that a person called Amran handed her RM240 being the three months' rental in advance. According to PW7, Amran obtained the money from the first respondent and handed it to her. She then handed the keys of the house to Amran. PW13, the investigating officer, agreed that the name Amran cropped up in the investigation. The exculpatory statement of the first respondent (D25) also mentioned Amran. The learned trial judge accordingly held that there was such a person by the name of Amran and that failure to call or offer him 'would automatically trigger off the invocation of the adverse inference under s 114(g) of the Evidence Act 1950'.

(v) Unsatisfactory features:

The learned trial judge considered the following as having grave adverse effect on the prosecution's case:

(1) that no fingerprint on the wrappers and loytape of the ganja and no fingerprints of the respondents were lifted and taken;

(2) that no photograph was taken of the street-lights in relation to the house, nor were such street-lights shown on the sketch plan; and

(3) that no clothing or personal effects in room 'K' of the said house in which the offending drugs were found was taken to prove the exclusive use of the room 'K' by the first accused and of the house by the three accused in view of the evidence of PW7 that she handed the keys of the house to Amran.

The Appeal

Before us, the learned deputy public prosecutor raised five grounds of appeal:

(1) that the learned trial judge erred in law and in fact when he held that there was a break in the chain of evidence pertaining to the seized cannabis;

(2) that on the proof of custody and control of the cannabis in question, the learned trial judge erred in law and in fact when he failed to give due consideration to the evidence and the role of the 'agent provocateur' PW9 (Detective Corporal Busra), but took into account such irrelevant factors:

(a) that Amran had 'access' or 'occupation' of the said house;

(b) that Amran obtained the rental from the first respondent to give to Azian (PW7);

(c) failure of the investigating officer (PW13) to take the fingerprints on the newspaper, white plastic and the loytape; A

(d) failure to take photograph of the street-light; and

(e) the consideration given by the learned trial judge to the cautioned statement of the first accused (first respondent);

(3) that the learned trial judge erred in law and in fact in ruling that there must be 'exclusive use of the room at K in P23' (where the drug was taken) to prove the charge of trafficking in this case; B

(4) that the learned trial judge erred in law and in fact in invoking the presumption of adverse inference under s 114(g) of the Evidence Act 1950 without giving due consideration to the overall evidence in this case; and C

(5) that the learned trial judge erred in law and in fact in failing to take into consideration the fact that the first and the second respondents tried to escape when PW8 (ASP Badaruddin) identified himself as a police officer and told them not to move. This fact, together with the rest of the evidence adduced as a whole, established a prima facie case against the two respondents. D

We shall now consider the grounds of appeal.

Ground (1) (break in chain of evidence) E

The evidence adduced by the prosecution clearly established the various stages of the handling of the cannabis from the time of its seizure to the time it was produced in court. What preyed on the mind of the learned trial judge was the lack of evidence as to the manner the cannabis was kept in the chemistry department while in the custody of PW1, the government chemist. With respect, such concern is, in our view, unwarranted. PW1 had clearly shown in her testimony that after receiving the cannabis from the police she subjected it to various standard tests which confirmed the presence of cannabinoids, the active constituents in cannabis resin. In order to facilitate her examinations, she broke up the slab of cannabis and after the tests were completed she put the remainder of the cannabis, which by then was in loose form, in a transparent plastic packet marked with the laboratory number (IP) 7458/91. She then signed on it and thereafter she heat-sealed the said packet. She further rewrapped this packet, the original plastic sheet, the loytape (P7 and P7A) and the newspaper (P6) in which the cannabis came, in the same brown paper that the police used to wrap the exhibit when it was first handed to her. This brown packet was then tied with a string and then sealed with the chemist department's seal: 'Jabatan Kimia Ipoh 2'. It is important to note that the three seals, both on the brown paper and on the transparent plastic packet, were found to be intact at the trial and were only broken by PW1 in court on the day she gave testimony. The evidence of the chemist PW1 had clearly shown that the cannabis which Insp Suhaimi bin Hashim (PW13) handed to her for analysis was the very cannabis she wrapped up with P8, F G H I

P7A, P7 and P6 after analysis, and then returned it to PW13. She also identified them in court. PW13 also confirmed that that was the packet he received back from PW1.

Having regard to the evidence of PW1 and PW13 and in the absence of any cross-examination by the defence about the safe-keeping of the cannabis and any suggestion of other chemist or chemists meddling with it, the concern of the learned trial judge that the cannabis exhibited in court might not be the same as the one seized from the house in which the respondents lived was, in our view, misplaced. On the evidence adduced, there cannot be any doubt that the cannabis seized and handed to PW1 and PW13 was the cannabis produced in court in this trial. When no such doubt existed, it was not essential for PW1 to show how she kept the cannabis before returning it to PW13, particularly when the defence did not at all cross-examine on or raise the issue. More pertinent to the instant ground of appeal, we are of the clear view that no question of 'break in the chain of evidence' arises. In *Su Ah Ping v PP* [1980] 1 MLJ 75 (FC), Suffian LP said (at p 76):

> The complaint before us was not that there had been no proof that the exhibits were serviceable, but simply that there was a 'break in the chain of evidence' and the prosecution should have called as witnesses all the officers through whose hands the exhibits passed from Insp Takbir to the armourer and back to the inspector. We do not think there is merit in this point. The question was whether the exhibits the inspector produced were the guns and ammunition he found at the scene, and as when he produced them as those very guns and ammunition there was no objection by the defence, it would have been a waste of judicial time to call all the intervening handlers. In our experience much judicial time is spent unnecessarily, notably in subordinate courts, in ensuring no break in the chain of evidence. In our judgment if the officer who picked up an object at the scene produced it and identified it as that very object, that is enough, and there is no need to call every other officer who handled it.

Learned counsel for the second respondent relied on *Abdul Jalil bin Abdul Satar v PP* [1991] 2 MLJ 194. With respect, that case is clearly distinguishable. There, the lance corporal who delivered the cannabis to the chemist and subsequently collected it back from the latter was not called to testify, and on the evidence there was doubt respecting the identity of the cannabis produced in court as being that seized from the appellant's premises.

Grounds (2) and (3)

Having regard to the evidence of this case, it is our view that the learned trial judge was unduly concerned with the exclusivity of possession of room 'K' and the custody and control of the cannabis in question in relation to Amran. It is essential to bear in mind that the case of the prosecution was *not* based on custody or control thereby invoking the presumption of possession, or on possession of 200g or more cannabis thereby attracting the presumption of trafficking under s 37(d) or (da)(vi)

of the Act. The prosecution founded its case of trafficking on the 'sale' of the cannabis to PW9, the agent provocateur.

Section 2 of the Act defines 'trafficking' thus:

> 'trafficking' includes the doing of any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying or distributing any dangerous drug;

Hence the definition of 'trafficking' in the Act is wide and includes not only buying and selling but also carrying, keeping and concealing.

In the instant case under appeal, there was more than credible evidence from the testimony of PW9 that the respondents acted in concert in the sale of the cannabis to him. The negotiation to buy ganja on the first occasion was spearheaded by the second respondent who told PW9 that his partner had ganja. PW9 was later introduced to the first respondent.

It is in evidence that on 31 July 1991 in the house No 129, there was discussion between the first respondent and PW9 about the supply of ganja, the first respondent told PW9 of the inadequacy of supply and that he (the first respondent) had only one kilogramme of ganja and the price was RM1,500. PW9 having agreed to the price, the first respondent directed the second respondent in Kedah dialect: 'Deris, pi siapkan barang'. The second respondent then went to room 'K' and took out the package of cannabis. All these constitute clear evidence of sale or supply within the definition of 'trafficking'. See *PP v Mohamed Halipah* [1982] 1 MLJ 155 where the charge was on sale of drugs; and apart from the admission in the cautioned statement, the material facts were, to a significant extent, similar. *PP v Tahir bin Kassim* [1985] was another case involving the element of negotiation for the sale of dangerous drugs. Mohd Dzaiddin J (as he then was) found that the defence had not, on the balance of probabilities, cast any doubt on the truth of the prosecution's case 'about the negotiation for the sale of drug by the accused ...' See also *PP v Manoharan all Ratnasamy* [1989] 1 MLJ 504; *Teh Geok Hock v PP* [1989] 3 MLJ 162. All these cases, it must be noted, dealt with situations after the close of the defence's case.

The learned trial judge relied on *Lee Chee Ming v PP* [1992] 1 SCR 1, *Pang Chee Meng v PP* [1992] 1 MLJ 137 and *Choo Chang Teik & Anor v PP* [1991] 3 MLJ 423. With respect, those cases are of no assistance. Unlike the present case under appeal where the thrust of the prosecution's contention is negotiated sale, those cases related, inter alia, to the questions of exclusivity or otherwise of the use or possession of rooms in which the drugs were found and knowledge of the drugs upon which applicability of presumptions under s 37 of the Act (in *Lee*'s case and *Choo*'s case) or applicability of s 27 of the Evidence Act 1950 (in *Peng*'s case) depended. None of the three cases involved the element of sale or negotiated sale.

As regards Amran, there is not a thread of evidence that he had in any way participated in any of the two negotiations or was in any way or

manner concerned with the sale of cannabis in this case. Accordingly the facts that Amran existed and was the person who handed over the three months' advanced rental from the first respondent to PW7 and received the keys for the house from PW7 are of little relevance to the charge against the respondents having regard to the basis upon which the prosecution preferred its charge, ie one of sale.

In the circumstances, the learned trial judge, in our view, had attached too great an importance to the existence of Amran and to what he did than they duly deserved.

We also find ourselves in agreement with the learned deputy public prosecutor that the learned trial judge had erred in law when he faulted PW13, the investigating officer, for not lifting the fingerprints off the wrappings of the cannabis and for not taking photographs of the street-light in front of the house No 129. Where the identity of a culprit is in question or required to be proved, fingerprint evidence would be of great significance and immense value. In the present case under appeal, however, the charge alleged trafficking in the form of sale and there was evidence indicating the identities of the alleged offenders and the sale transaction. Fingerprint evidence on the newspaper wrapping, white plastic and the loytape, therefore, assumed little value or significance.

As to the failure to take photographs of the street-lights in relation to the house and to include the lights in the sketch plan, the learned trial judge took exception to the failure on the ground that these were 'vital items to support the prosecution case that the area was lighted that morning during the raid'. With respect, the omissions have, in our view, been over-emphasized. The police photographers were at the scene and the sketch plan was drawn on 2 August 1991, ie 2–3 days after the incident. At best the photograph, if taken, and the lights, if incorporated in the sketch, would merely indicate the existence of the lighting facilities at the time of photographing rather than the situation that the area was actually lit at the material time of the alleged offence. In any event, what really mattered were the events taking place inside the house and not outside it. The respondents, it will be recalled, were caught together with the cannabis in question and had unsuccessfully attempted to flee — the first respondent's attempt was thwarted by PW9 barely before he started whilst the second respondent managed to make it only to the door. The intention to flee — when considered in the light of the evidence of the 'sale' immediately preceding it — justifiably necessitated some explanation from the respondents. This incidentally disposes of ground 5 of the appeal.

In relation to the use of the exculpatory statement of the first respondent (D25), we note that the learned trial judge had used the statement to conclude that Amran occupied room 'K' in the house. Learned counsel for the first respondent had also submitted before us that the first respondent's statement, D25, showed that he (the first respondent) did not negotiate nor did he ask the second respondent to buy the cannabis.

With respect, we are of the view that the approach was wrong. A purely exculpatory or self-serving statement is not evidence of the facts stated though it may be admitted to show the reaction or attitude of the accused at the time when he made it. And in considering whether there is a case to answer, the trial judge ought not take into account such a statement as the basis for founding an order of acquittal and discharge. *PP v Adetunji Adeleye Sule* [1993] 2 MLJ 70 (SC) was a case involving presumption under s 37(1)(d) and (da) of the Act by reason of the accused being in manual possession of the trunk in which heroin was found. The (then) Supreme Court set aside the order of discharge and acquittal made by the trial judge at the end of the case for the prosecution. Delivering the judgment of the court, Edgar Joseph Jr SCJ (now FCJ) — after expressing that the conduct and demeanour of an accused should not by themselves be sufficient to rebut a statutory presumption that had arisen against the accused — said (at p 74):

> In the same way, in a case where the onus lies on an accused to rebut a statutory presumption, a voluntary out of court statement by the accused — and this would include a cautioned statement — which is wholly exculpatory *should* not be made the foundation of an order of acquittal especially at the close of the case for the prosecution, since, at that stage, the accused not having given evidence himself, his explanation could not be tested by cross-examination.

In the Singapore case of *PP v Chan Kim Choi* [1989] 1 MLJ 404, Coomaraswamy J — speaking of the evidential status of exculpatory or self-serving statements — said (at p 413):

> They are admissible on the ground, as the Privy Council has put it, that 'common fairness requires that the entirety of the statement should be admitted so as to show the precise context in which the admission was made'...What he says in order to exculpate himself cannot be admissible as the truth because it is self-serving and also because it is not necessarily consistent with other facts that may be established by the prosecution in the course of the trial.

Although the conviction of murder in *Chan Kim Choi*'s case was set aside on appeal for a lesser offence of culpable homicide not amounting to murder for a different reason (see *Chan Kin Choi v PP* [1991] 1 MLJ 260), the exposition of law on exculpatory statements was accepted. Of particular relevance to our present case is the affirmation of case to answer. Lai Kew Chai J, delivering the judgment of the court, said (at p 263 of *Chan Kin Choi v PP*): 'The trial judges called for the defence. This we think was entirely proper'.

Shortly thereafter, he went on (at pp 263–264):

> We should now refer to an astonishing submission made by former counsel of the appellant. In contending that there was no case to meet, he submitted that the explanations of the appellant given by the appellant in his voluntary statement should be accepted as true on the ground that the voluntary

statement had been tendered by the prosecution as part of its case against the appellant. This extravagant submission not unexpectedly received short shrift from the trial judges. They ruled that it was not the law in Singapore that exculpatory statements in a confession used by the prosecution as part of its evidence were admissible as evidence of the truth of the contents thereof. That ruling was patently correct.

In *R v Storey and Anwar* (1968) 52 Cr App R 334 (CA), the police found a large quantity of cannabis resin in the defendant Miss Storey's flat. In the voluntary unsworn statement to the police, she said that the cannabis resin belonged to an Indian man called Ali who brought it into her flat against her will. Her explanation, if true, would have proved that she was never in possession of the cannabis resin. At the close of the case for the prosecution, the defence submitted that there was no case to answer. The trial judge overruled the submission and called for the defence. On appeal, the Court of Appeal (English Criminal Division) upheld the trial judge's ruling, holding that the defendant's statement to the police was not evidence of the truth of the facts therein, but only of her reaction to the police enquiries, and the defendant's unsworn statement did not nullify the evidence of possession suggested by the presence of the cannabis resin in her flat. In his judgment, Widery LJ said (at pp 337–338):

> The question which arises in this case is whether the fact that she gave shortly afterwards an explanation which, if true, would provide a completely innocent explanation is enough to produce a situation in which the learned judge's duty was to say that there was no case to answer.
>
> The court has given careful consideration to this important point. We think it right to recognize that a statement made by the accused to the police, although it always forms evidence in the case against him, is not in itself evidence of the truth of the facts stated. A statement made voluntarily by an accused person to the police is evidence in the trial because of its vital relevance as showing the reaction of the accused when first taxed with the incriminating facts. If, of course, the accused admits the offence, then as a matter of shorthand one says that the admission is proof of guilt, and, indeed, in the end it is. But if the accused makes a statement which does not amount to an admission, the statement is not strictly evidence of the truth of what was said, but is evidence of the reaction of the accused which forms part of the general picture to be considered by the jury at the trial.
>
> Accordingly, in our judgment, in this case the fact that the cannabis was on the applicant's bed in her flat was in itself some evidence of possession to go the jury. Her unsworn explanation, although, if true, it would have been a complete answer to the charge, did not cancel out or nullify the evidence which was provided by the presence of the cannabis. It was ultimately for the jury to decide whether that explanation was or might be true, and it was not for the judge necessarily to accept it at the stage when he was considering the submission. In the event therefore, we have come to the conclusion that the learned judge was entitled to and right to leave this matter to the jury and not to withdraw it from them merely because the accused's unsworn explanation would, if true, have been a complete answer to the charge.

Of course, we in Malaysia no longer use the jury system. The trial judge has to play the role of a decider of law and of fact at the close of the prosecution case, and where the defence is called. Nevertheless, the principles of law relating to the effect of exculpatory statement remain the same.

We now come to the fourth ground.

Ground (4)

The learned trial judge invoked adverse presumptions under s 114(g) of the Evidence Act 1950 for the non-calling of the informer, Cholar and the co-occupier of the premises, Amran by the prosecution as witnesses and for failing to offer them to the defence at the close of the prosecution case. His reason for doing so was based on his finding of fact that Cholar's role was not just an informer but was an active participant in the circumstances leading to the commission of the offence because he not only introduced PW9 to the second respondent but was also present during the subsequent transactions involving the one kati and one kilogramme of cannabis. Before us, it was submitted for the respondents that Cholar as an informer had turned into an agent provocateur. *Namasiyiam & Ors v PP* [1987] 2 MLJ 337 was cited in support.

The Act does not define 'informer' and 'agent provocateur'. But the distinction is recognized (see ss 40 and 40A of the Act).

In *Munusamy v PP* [1987] 1 MLJ 492 (SC), Mohd Azmi SCJ (now FCJ) in delivering the judgment of the court, opined (at p 494) that 'whether a person is an informer or has become an active agent provocateur would depend on the facts of each particular case'. In our instant case under appeal though Cholar introduced PW9 to the second respondent and was present when both transactions involving cannabis were struck, there was no evidence that he had done anything apart from being present. It appears obvious that his presence during the negotiation process and the transactions was merely to lend credence to PW9's intention to purchase the cannabis in the minds of the respondents. In *Namasiyiam & Ors v PP* [1987] 2 MLJ 336, the judgment shows that Francis, the 'informer' (as the police called him throughout the trial) took an active part not only by introducing the agent provocateur to the offenders but also acted as the latter's spokesman and participated in the trap leading to the arrests of the offenders and the seizure of the drugs.

On the particular facts and circumstances of the instant case under appeal, we are of the view that Cholar was not an agent provocateur. But even if he was, there is more than sufficient credible evidence of the respondents' involvement in the negotiation and agreement to sell to PW9 the 902g of cannabis subsequently brought out by the second respondent from room 'K' in the said house.

In the case of Amran, the learned trial judge relied on the evidence that Amran handed the first respondent's rental in advance to PW7 and received the keys of the house from PW7. The trial judge also relied on the exculpatory statement of the first respondent which mentioned Amran.

Evidence adduced shows that Amran had passed the three months' advance rental from the first respondent to PW7 Azian from whom he received the keys of the house. But this took place on 28 June 1991 — more than one month before the alleged offence. True, in the first respondent's exculpatory statement D25, Amran was said to have occupied room 'K' of the house, and the learned trial judge concluded that Amran had access or occupation of the premises; the fact remains that there is not an iota of evidence that Amran had in any way whatsoever involved himself or participated in the negotiations or sales of the cannabis on any of the occasions. This was of particular importance in view of the basis of the 'trafficking' charge relied on by the prosecution which was one of sale resulting from negotiations. We are of the view that Amran was not an agent provocateur.

Much had been canvassed before us respecting the drawing of adverse inference under s 114(g) of the Evidence Act 1950 from the non-calling of Cholar and Amran. Whether or not such an inference should be drawn is not a matter of an inflexible rule but depends upon the circumstances of each particular case. In determining this issue, the question to consider is whether the existence of a fact or a state of things (ie Cholar introducing PW9 and was present at the meetings; Amran staying in room 'K') makes the existence of another fact or state of things so likely that it may be presumed to exist. The answer must naturally vary according to the circumstances, the nature of the fact required to be proved and its importance in the controversy, the usual and commonly recognized mode of proving it, the nature, quality and cogency of the evidence which had not been produced and its accessibility to the party concerned.

In our instant case under appeal, there can be no doubt that the basis of the prosecution's case to substantiate the charge was on the sale of the cannabis resulting from negotiation. There is ample evidence of direct negotiation between PW9 and the first respondent, and the carrying of the cannabis from room 'K' by the second respondent at the behest of the first respondent. On that basis, and given the roles played by Cholar and Amran as reflected from the evidence adduced, it is difficult to see how the two of them can be material to the point in issue, ie sale through negotiation. Furthermore, the materials on record do not in any way suggest that the prosecution had withheld them with ulterior motives. We do not think any adverse inference should be drawn against the prosecution for the non-production of them, at least at this stage of the trial.

We have considered the submissions by counsel for both sides and the evidence adduced by the prosecution. As submitted by the learned deputy public prosecutor, it was the case of the prosecution that the 'trafficking' took the form of negotiation for sale and the sale of the cannabis. There is ample evidence of the negotiation leading to the agreement for the sale of the cannabis at RM1,500 per kg between the first respondent and PW9. The role of the second respondent included he bringing and introducing PW9 to the first respondent with full knowledge of the purpose which was for the sale of ganja and the bringing of the ganja from a room in the said house. Having regard to the definition of 'trafficking' and the evidence adduced including the evidence of sale, we are unanimously

of the view that the non-calling of Cholar and Amran does not affect the success of the prosecution at the conclusion of its case in establishing a case under s 180 of the Criminal Procedure Code (FMS Cap 6), that a case under the said s 180 against both respondents has been made out, and that this is so even if the more stringent test of 'proof beyond reasonable doubt' as propounded in *Arulpragasan a/l Sandaraju v PP* (Federal Court Criminal Appeal No 05–237–1992) were to be applied. Accordingly, the appeal is allowed. The orders of discharge and acquittal are set aside. The case be remitted to the High Court at Taiping before the same trial judge for continuation of the trial and the two respondents be called to enter upon their defence. Both respondents are to be remanded in prison until trial.

Appeal allowed, acquittal and discharge set aside.

Reported by Shamsul Sulaiman